MEMORANDUM FOR: [redacted] 25X1

FROM: [redacted] 25X1
O/D/DCI/IC

Date 13 Sept 76

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OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (INTELLIGENCE)/
DIRECTOR OF DEFENSE INTELLIGENCE

WASHINGTON, D. C. 20301

8 SEP 1976

MEMORANDUM FOR THE DEPUTY TO THE DCI FOR THE INTELLIGENCE COMMUNITY

SUBJECT: Scope of the Term Sources and Methods as Employed in the Secrecy Agreement Requirement in Executive Order 11905

1. Pursuant to your request, please find attached a summary of the Department of Defense position on the legal and practical considerations involved in the question of whether secrecy agreements should encompass all sources and methods or just classified sources and methods. This has been prepared at our request by the Defense Intelligence Agency General Counsel.

2. I have taken the liberty of preparing a proposed draft of a letter from you or the Director of Central Intelligence to the Attorney General requesting his opinion in this matter to which can be appended the respective Department of Defense and Central Intelligence Agency positions on this question.

Enclosures a/s

Thomas K. Latimer
Principal Deputy

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20301

U-266/AGC 8 September 1976

MEMORANDUM OF LAW FOR THE DEPUTY TO THE DCI FOR THE INTELLIGENCE COMMUNITY

SUBJECT: Department of Defense Position on the Scope of the Term Sources and Methods as Employed in the Secrecy Agreement Requirement in Executive Order 11905

The Department of Defense (DoD) takes the position that the term intelligence sources and methods as employed in paragraph 7. of Executive Order (E.O.) 11905 must be read to refer only to classified intelligence sources and methods for the following reasons:

1. The U.S. Court of Appeals for the 4th Circuit opinion in the Marchetti case is construed to stand at least in part for the proposition that only classified intelligence information containing sources and methods is protectable under a secrecy agreement because of the First Amendment rights of the U.S. Constitution and only classified intelligence information containing sources and methods would be protectable from publication by judicially imposed restraint. The opinion of the Circuit Court provided in part:

> "As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.
>
> Thus, Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain."

2. The fact that several U.S. District Courts may be willing to allow withholding of unclassified intelligence information containing sources and methods when requested pursuant to the Freedom of Information Act (5 U.S.C. 552) is not considered sufficiently persuasive authority to support an assumption that the same reasoning would be accepted in the pre-publication restraint context especially in view of the Supreme Court's historical reluctance to allow any pre-publication restraint. (See generally New York Times Co. v. United States, 403 U.S. 713).

The opinion opened as follows:

> "We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Porcess on Viet Nam Policy." POST, pp. 942, 943.
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> 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' BANTOM BOOKS, INC. v. SULLIVAN, 372 U.S. 58, 70 (1963); see also NEAR v. MINNESOTA, 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' ORGANIZATION FOR A BETTER AUSTIN v. KEEFE, 402 U.S. 415, 419 (1971). The District Court for the Southern District of New York in the NEW YORK TIMES case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the WASHINGTON POST case held that the Government had not met that burden. We agree."

Mr. Justice White, in a concurring opinion, summed up the essence of this case as follows:

> "The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens 'grave and irreparable' injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.
>
> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."

3. The Intelligence Community has been able to live with and adhere to the idea that classification is the criteria to be employed in the protection of sensitive information and any effort to seek to enhance the Government's ability to withhold additional information at this late date and in the present political climate must be approached with the utmost caution. By not appealing the U.S. Federal District Court's decision in the case of U.S. v. Jarvinen the Central Intelligence Agency (CIA)/ Director of Central Intelligence (DCI) set a precedent in 1952 which is

considered to be equally valid in 1976 and as warranting continued adherence (see Guide to CIA Statutes and Laws (1970), footnote 21 at page 16).

> "Since the intelligence source was hardly a secret one and since no classified information was involved, an appeal, risking an adverse decision in terms harmful to the exercise of the Director's responsibility to protect sources and methods in the future, was not warranted. Pardon was sought, and granted by President Truman on December 16, 1952. (The subject of the prosecution) was acquitted. United States v. Jarvinen, No. 48547, October 1952 (unpublished)."

As late as 8 March 1971 the DCI, Mr. Helms, issued a classified United States Intelligence Board memo entitled "Guidelines Governing Disclosure of Classified Intelligence, the contents of which are believed supportive of the argument that classification of sources and methods has been traditionally required in order to insure their protection.

4. The relationship between the President, National Security Council (NSC) and DCI as spelled out in the National Security Act of 1947 (50 U.S.C. 402, 403) as well as the manner in which this legislation has been implemented by practice during the last 30 years should be considered. The fact that the NSC advises the President and that the DCI is under the NSC and performs its coordination under the direction of the NSC, suggests that the DCI is subject to greater Presidential supervision and control and enjoys less independence then might appear at first blush. The DCI's responsibility for the protection of sources and methods from unauthorized disclosure is considered to carry with it, by implication, the words "as determined by the President". DoD believes that the President through the classification system, which is currently spelled out in E.O. 11652, has prescribed the exclusive system and criteria to be employed by the Executive Branch of the Government in connection with the protection of sensitive intelligence sources and methods. The President has included specific reference to intelligence sources and methods in this E.O. and is felt to have further circumscribed the DCI's responsibility in this area by the language contained in section 9 of E.O. 11652.

5. There is no question that the DCI has an administrative responsibility under the provision of the National Security Act; therefore it is considered appropriate that a Director of Central Intelligence Directive (DCID) be employed to implement the secrecy agreement provision of E.O. 11905. However it is considered vital that it be appreciated that the DCID will be applicable throughout the Executive Branch of Government and its affect will not be merely limited to laying the foundation for pre-publication judicial restraint. Rather it will be cited as the basis for imposing a condition precedent to some Federal employment, may become the basis of adverse administrative action against Federal employees and be

employed as a form of notice of the possibility of criminal prosecution. It will apply to those persons in the Federal employ who run the gamut from the unique status of those employed by CIA and the National Security Agency (NSA) through excepted service employees at such places as the Defense Intelligence Agency, regular Civil Service employees and include quite possibly some of those who are members of unions. It would also of course be binding on members of the military service. The potential problems which might arise under the varying conditions of employment of these various categories of people is not a matter which is believed to have been explored to date.

6. DoD insistence on the continued application of the classification criteria is believed to be further supported by the language in the White House proposed and Justice Department reviewed legislation amending the National Security Act of 1947 which was announced by the Attorney General at the White House Press Conference at which E.O. 11905 was made public. The language employed in the criteria describing positions of special trust in the proposed E.O. intended to replace E.O. 10450 which is currently being circulated for comment by the Office of Management and Budget also tends to support the DoD position. Both of these documents speak in terms of classified intelligence information containing sources and methods.

7. Finally, it is suggested that considerations of consistency would encourage if not dictate that the information to be protected would be so defined as to provide Government with the maximum number of possible alternatives (i.e. prior restraint, adverse administrative action, criminal prosecutions, etc.) as might be available to it under the law.

FOR THE DIRECTOR:

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General Counsel
Defense Intelligence Agency